United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-1348

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76 - 1348

B
P/S

UNITED STATES OF AMERICA,

Appellee,

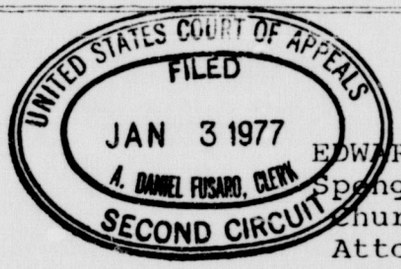
-vs.-

ROBERT BERKSON,

Defendant-Appellant.

On Appeal From The United States District Court
For The Southern District Of New York

PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING EN BANC



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Preliminary Statement

Robert Berkson petitions the Court for rehearing (F.R.A.P., Rule 40), and suggests rehearing en banc (F.R.A.P., Rule 35), of the Order of this Court, dated December 17, 1976 (Appendix A, hereto, infra), which affirmed, without opinion, the judgment of conviction previously entered against him on July 21, 1976 in the United States District

Court for the Southern District of New York after a jury trial before the Honorable John M. Cannella.*

Questions Presented for
Rehearing and Rehearing En Banc.

This case presents a substantial issue, of first impression, with respect to the scope of Rule 801 (d)(1)(A) of the recently enacted Federal Rules of Evidence. The Rule, in pertinent part, provides as follows with respect to the use of prior inconsistent testimony as substantive evidence at a trial:

> "(d) Statements which are not hearsay.
>
> "A statement is not hearsay it -
>
> "(1) Prior statements by a witness - The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition,***"

In the instant case, which involved a stock brokerage firm's fraudulent use of customers' securities, the chief government witness failed, in his trial testimony,

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*Berkson was jointly tried with a co-defendant, Maurice Rind. A first trial concluded when the jury was unable to agree upon a verdict. The second trial concluded with verdicts of guilty, as to both defendants, upon one count of mail fraud (18 U.S.C. § 1341), two counts of stock fraud (15 U.S.C. § 77q[a]), four counts of interstate transportation of forged securities (18 U.S.C. § 2314), and one count of conspiracy to engage in the aforesaid conduct (18 U.S.C. § 371).

to inculpate the appellant Berkson with respect to knowledge or participation in the fraudulent scheme. Over defense objection, the government, citing Rule 801(d)(1)(A), was permitted to introduce into evidence a portion of the witness's grand jury testimony. That testimony consisted of six questions and answers, all of which would have been inadmissible if elicited at the trial in the first instance. It consisted of conclusions and opinions, failed to specify the reasons for the witness's beliefs, and failed to focus upon the knowledge and activities of the defendant Berkson, as distinguished from the knowledge and activities of a co-defendant.

The questions presented for rehearing and rehearing en banc are:

1. Is such testimony properly admissible as substantive evidence under the Rule 801(d)(1)(A) exception?

2. If it is admissible, can it, standing alone, as charged to the jury in the present case, constitute sufficient evidence for a conviction?

It is respectfully submitted that, in affirming the conviction herein, without opinion, the panel must necessarily have overlooked or misapprehended the substantial nature of the questions presented.

It is further respectfully submitted that rehearing en banc is appropriate since the questions involved are of exceptional importance to the administration of criminal justice, and a prompt, authoritative construction of Rule 801(d)(1)(A) will avoid the future proliferation of litigation involving

these issues.

Counsel certifies that this petition is filed in good faith and not for reasons of delay.*

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*The trial court sentenced the appellant Berkson to a period of probation, and did not impose a prison sentence.

Statement of the Case*

The appellant Berkson was one of several principals of the New York stock brokerage firm of Packer, Wilbur & Co., Inc. During the period from August through December, 1970, various employees of the Firm forged customers' names upon stock powers, thus enabling the Firm to utilize certain customers' securities for its own benefit. The forgeries were accomplished by or under the supervision of James Gallentine, the Firm's cashier.

Testifying as a government witness at the trial, Gallentine claimed that he had engaged in this activity pursuant to requests of he Firm's president, Wilbur Hyman (an indicted co-defendant, who was a fugitive at the time of trial), and the Firm's vice-president, Maurice Rind (who was jointly tried with Berkson). (Tr. 38-42, 51-4, 65, 75-83).** Galletine's trial testimony made clear that he took orders only from Hyman and Rind (Tr. 33). At no time in his testimony did Gallentine state that the appellant Berkson had any involvement or contemporaneous knowledge relating to the unauthorized use of customers' securities. Indeed, Gallentine denied having any conversations with

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*This Statement of the Case will not attempt to review the trial evidence. Such a review is contained in our main brief on appeal, at pp. 3-15. We shall here re-state only those facts immediately relevant to the issue presented for rehearing.

**References are to the Appellant's Appendix, which retains the pagination of the trial transcript.

Berkson about forging of customers' securities (Tr. 95-7, 102). There being no other evidence in the case to establish such knowledge or involvement on the part of Berkson, the government was permitted, over objection, to introduce into evidence certain portions of grand jury testimony given by Gallentine on June 4, 1973, i.e., more than two years after the underlying events and three years prior to trial. testimony was as follows:

> "Q. Now, apart from Mr. Rind, did you have any conversation with either of the principals of the company with regard to the use of customers' Leasepac stock for the benefit of the firm?
>
> "A. No, no. Mr. Rind just handled -- Mr. Rind set up the transactions, be they sales or loans, and he followed through. Mr. Berkson and Mr. Hyman were aware, yes, but my contact was with Mr. Rind.
>
> "Q. Well, you say that Mr. Hyman and Mr. Berkson were aware. Could you tell us how you know Mr. Hyman and Mr. Berkson were aware of what was going on?
>
> "A. Well, I had conversation with them as to how we got through the day cash-wise, what we had to do in order to get up the amount of cash necessary.
>
> "Q. In other words, from time to time you would tell them that Mr. Rind arranged for the transactions in stock to generate some cash and you provided customers securities to cover that transaction, and that is how you got the cash on a particular given day?
>
> "A. Yes, yes.
>
> "Q. And you would explain to them that you actually went through the process of the unauthorized use of customers' securities for this purpose?

"A. Yes, yes. I didn't state specifically what accounts or which customers were used but generally, just generally speaking, we were using customers' securities.

"Q. And both Mr. Berkson and Mr. Hyman knew about that?

"A. Yes.

"Q. And the reason you can say that is that you specifically recall telling them about what was going on?

"A. Yes, I spoke to them about it." (Tr. 102-5).

The District Court initially ruled that the testimony was admissible for purposes of impeachment, and reserved decision as to whether it would be received as substantive evidence pursuant to Rule 801(d)(1)(A) of the Federal Rules of Evidence (Tr. 97-101). Subsequently, the Court charged the jury that the testimony was substantive evidence in the case (Tr. 569).

The otherwise barren nature of the government's case against Berkson is demonstrated by the prosecutor's statement to the trial court, at the end of the government's case, during his plea that the grand jury testimony be received as substantive evidence:

"Well, Your Honor, it seems to me that there is, the very least, a potential problem on the subject of motions to dismiss the case at the close of the government's case without that evidence in the case as substantive evidence." (Tr. 356).

Similarly, the trial court, in its charge to the jury, instructed that Berkson could be convicted upon the grand jury testimony alone:

"If you believe the testimony of Gallentine to be true beyond a reasonable doubt, that testimony is sufficient to convict the defendant even though it is not corroborated by any other evidence." (Tr. 567)

* * *

"In essence ... if you find, for example, that Gallentine was saying the truth when he appeared before the grand jury, you may consider that as evidence in the case.

"On the other hand, if you find that he was not, then you will, of course, disregard it or compare it to other statements which were made which indicate that the other statements are true. Those are the ones where he said Berkson knew nothing about it." (Tr. 569-570).

Reasons for Granting
Rehearing or Rehearing en banc.

We must assume, as indicated by the prosecutor's statement to the trial court, (supra, p. 7) and as permitted by the trial court's charge to the jury (supra, p. 8), that the jury would not have convicted the appellant Berkson were it not for the admission of Gallentine's grand jury testimony as substantive evidence.

The recent enactment of Rule 801 was within the setting of a conflict in the circuits. The majority prohibited the use of prior inconsistent statements as substantive evidence. This Circuit, however, adopted the minority view and permitted such statements to be used as substantive evidence. United States v. DeSisto, 329 F. 2d 929 (1964), cert den., 377 U.S. 979 (1964). However, neither

DeSisto, nor any subsequent case refer... to it, nor any authority interpreting Rule 801, has ever permitted such use of prior, apparently inconsistent testimony where that testimony was violative of evidentiary rules other than the narrow hearsay ground to which DeSisto and Rule 801 address themselves (See: the extensive analysis of DeSisto, its progeny, and the history of Rule 801, set forth in our main brief at pp. 17-24).

The objectionable nature of the grand jury questions and answers is analyzed in some detail at pages 24-26 of our main brief. Aside from the obviously objectionable character of those questions and answers, there is a subtle, and for that reason, more devastatingly improper impact which they have when taken as a group. While some of the questions appear to be attempting to narrow the field created by the prior question or answer, the successive questions and answers have a cumulative "snowball" effect, picking up pockets of error, confusion and equivocation, and passing them through tothe subsequent testimony.

At best, Gallentine's grand jury testimony was equivocal. Going beyond the question of admissibility, we respectfully suggest that it certainly would not properly provide the basis for a conviction. See: Greene v. California, 399 U.S. 149, 163 fn. 15; Weinstein's Evidence, Vol. IV, p. 801-24, fn. 3.

It is not necessary for grand jury testimony to adhere to rules of evidence for the purpose of justifying an

indictment. However, by Rule 801, Congress has created a new function for grand jury testimony, and the quality of that testimony must be such as to meet the requirements of the function. Unless this is so, Rule 801 will be nothing less than an engine for the destruction of the rules of evidence. The prosecutor could regularly ask his grand jury witnesses unfounded questions, calling for conclusory answers, and then if the witness disappoints the prosecutor at trial, the grand jury testimony would come in as substantive evidence, as was here the case. Our analysis of this aspect of the problem is set forth at pp. 28-34 of our main brief.

It is respectfully submitted that this Court either upon rehearing or rehearing en banc, should clearly delineate, in an opinion, the obligation of a prosecutor to adhere to the fundamental rules of evidence when presenting testimony to the grand jury, if he wishes to have the Rule 801 remedy available to him at the time of trial. The issue is one which cries out for authoritative discussion in view of the likelihood that increasing resort to the remedy will occur in the future as the result of the enactment of Rule 801.

Conclusion

For all of the above reasons, this Court ought to grant rehearing or rehearing en banc, and the judgment of conviction herein should be reversed.

Respectfully submitted,

EDWARD BRODSKY
Spengler, Carlson, Gubar,
Churchill & Brodsky
Attorneys for Defendant-
Appellant Robert Berkson

HENRY J. BOITEL,
of Counsel.

December 31, 1976

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of December one thousand nine hundred and seventy six.

Present: HON. WILLIAM H. MULLIGAN

HON. WILLIAM H. TIMBERS

HON. ELLSWORTH A. VANGRAAFEILAND

Circuit Judges,

United States of America,
Plaintiff-Appellee

v.

Robert Berkson, James Gallentine, Wilbur Hyman, Maurice Rind,
Defendants

Maurice Rind, Robert Berkson,
Defendants-Appellants.

76-1348
76-1367

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and ~~xkhrxxhyoixxx~~ they hereby are affirmed.

A. DANIEL FUSARO
Clerk

by
Vincent A. Carlin
Chief Deouty Clerk

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

-vs.-

AFFIRMATION OF SERVICE

ROBERT BERKSON,

Appellant.

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HENRY J. BOITEL, being an attorney duly admitted to practice law in the Courts of the State of New York, and a member of the Bar of this Court affirms the following to be true under penalties of perjury, pursuant to Rule 2106 CPLR:

1. On December 31, 1976 I served two copies of the petition for rehearing and suggestion for rehearing en banc upon the United States Attorney for the Southern District of New York, 1 St. Andrew's Plaza, New York, New York 10007, by depositing same in a post-paid, properly addressed wrapper in an official depository under the care and custody of the United States Postal Service within the State of New York.

HENRY J. BOITEL

New York, New York
December 31, 1976